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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 291

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER

vs.

MACK SAXON, ANCILLARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE IN TEXAS OF THE ESTATE OF J. W. MOORE, DECEASED, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Brief For The Respondent

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(No. 36,105)

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Brief For The Respondent

STATEMENT

We refer to the statement made by petitioner in the application for certiorari and in its brief filed herein; also to the Statement of the Case made by the Supreme Court of Texas, beginning about the

middle of page 112 and concluding near the bottom of page 114 of the Transcript of Record. For convenience of the Court, the full opinion of the Supreme Court of Texas is printed in the back of this brief.

Due to inaccuracies and omissions, we will make some additional statements and references to the Record.

J. W. Moore, the deceased, was head-brakeman on a West-bound freight train. This train was to meet passenger train number 22, which was journeying to the East. The passenger train had no notice of the freight train, but the freight train was required to take notice of the passenger train. In order to effectuate the passing of the two trains, the freight train, under the rules, was required to take siding, and, in taking the siding, was required to clear the point of departure from the main line at least five minutes before the due time of the passenger train. The conductor of the freight train decided to make the meeting point at Tolar, but, on arriving at the switch or side-track at Tolar, it was seen that the freight train could not clear this point of entrance on to the side-track the necessary five minutes. Under the rules of the company, in a situation of this kind, it became the duty of the head-brakeman, the position occupied by the deceased, to throw the switch and permit the entrance of the freight train on to the side-track, and then to proceed, as rapidly as he could, West, for the purpose of flagging the on-coming passenger train, to prevent a collision with the

freight train as it was passing from the main line track on to the side-track. The deceased had another duty in connection with this movement, which was to finally be at the head end of the freight train, in order to throw the switch to permit the same to go back on to the main line track. In this case, however, the railway company fireman testified that he had agreed to do this particular work for the head-brakeman, who stated that he also wanted to look at some of the box-cars, as they passed the switch, for hot-boxes. After the engine and a few of the box-cars had passed the place of entrance on to the side track, the deceased, with his flag, ran along by the side of his train, and, in the direction the same was going, for the evident purpose of flagging the expected passenger train, should it show up on time. While running along by the side of the train and in the place provided for brakemen to so work, and, in seeking thus to accomplish and to do his duties and work, he fell under the train and was killed.

In its application for certiorari, the petitioner states that the deceased had arranged to have his work done by the fireman, and had no occasion, either to run along by the side of the train, or to board same, and, that the course he was taking was done without reference to the discharge of any duties or work he had to perform. The undisputed testimony, coming from witnesses of both sides, is that the rules of the company required the head-brakeman to go up the track and flag the approaching passenger train, under the facts as de-

tailed by the different witnesses as to the five-minute rule.

J. L. Mayhall, a brakeman on the freight train, and a witness for the petitioner, testified:

> "That freight train was run into this siding on what is known as short time in railroad language, it was pretty close time. By short time I mean that it was a pretty close margin to give time to clear that switch point for the passing passenger train."—Tr. p. 38.

Further testifying, the same witness said:

> "He also had a duty with reference to that passenger train that was coming, he had to protect our train against the passenger train. As to what he would have done, if he had done just what his duty called him to do—well, he would have to be on head end, be in a position to flag in case we broke in two, or, didn't get into the clear in time, he would have to be towards the head, to be as far up the track as he could be when he flagged the passenger train."—Tr. pp. 39-40.

H. C. Delaney, fireman on the train, testified for the petitioner:

> "Under the rules of the Company, where we were not clearing the five minutes, we are required to put a man out to flag the train. That is what Mr. Moore was doing, he got off the train, and him not coming over, it would be my duty to flag, being on head end. To flag, Mr. Moore should have been as far up the main line

as possible, as far toward the head end. A fireman is required to flag if the brakeman can't. It was Mr. Moore's duty to be as far up the track as possible. * * * * At the time we started in on the passenger track, we didn't think we would have time to clear it within the rules."—Tr. pp. 61-62.

C. A. Crista, the engineer on the freight train and a witness for petitioner, testified:

"According to my first estimate, I cleared it at 9:55 or 9:56. If it was 9:56, I had one minute, and the rule required five. The only way I had the right to make that run and make that clearance, was for Mr. Moore or the fireman to flag that train. It is the duty of the brakeman to flag the train, but in the absence of the brakeman, I have a right to require the fireman. It was the duty of Mr. Moore, the head-brakeman, to flag that train, and he had a flag."—Tr. p. 66.

W. J. Smith, the conductor of the freight train, and a witness for petitioner, testified:

"Among other duties that the head-brakeman would have, if we were running into Tolar switch on short time, would be his duty to flag against number 22. And in order to flag against number 22, he ought to be as far up the main line track as he could get. That would be his duty to get there."—Tr. pp. 69-70.

In the next few sentences the conductor continues to say that the clearance was not made within the five minute rule, according to his rec-

ord, or the record of the fireman, or the record of the other brakeman.

ON NEGLIGENCE

Between the main line track and the side track, the space was prepared as a place of work for brakemen engaged as the deceased was at the time of his death. This was not a siding out in the country, but was a siding or switch track in the town of Tolar, and the space between the tracks had been filled in and made hard for the purpose of making it safe for the discharge of such duties as were being undertaken by the deceased. There was, of course, testimony along this line.

Mr. Mayhall testified:

> "Between those tracks there is a place that has been put there for the use of brakemen in running up and down freight trains and making couplings and getting off and on cars, that is the work place. It is covered with screening and beaten down—well, I don't know whether beaten down, it is packed. It is a well worn and hard surface."—Tr. p. 40.

On cross, the same witness said:

> "I stated that the walk way along the side of the track was hard walk way."—Tr. p. 44.

The testimony of several witnesses is to the same effect. So, also, is the testimony of several witnesses that, as far as appearances are con-

cerned, the soft place or hole could not be detected. It resembled the other parts of the pathway. It could only be detected by stepping into it.

There are three pictures appearing in the Transcript of the Record. An examination of these shows the ground to have been prepared for this work and shows it all to look alike.

R. O. Robinson described the hole or soft place in this language:

> "It wasn't exactly a hole, it was just a little bit lower place than the surrounding ground, not very much lower but a little lower. It was possibly some six or eight feet long, I judge—I might not be correct but something near that, and possibly three feet wide. It was just a little bit lower than the other ground surrounding it, *the same color ground and everything*, but just a little lower and softer than the surrounding ground. I stepped in it to see how much it would give. * * * * * If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble in my judgment. That hole was right in the pathway. There was a pathway there, it was well beaten. It was the same color, but you could tell it was worn out."—Tr. p. 54.

Leonard Mayhon testified that shortly after Mr. Moore was killed he went to the place of the accident, and, then, as follows:

> "I saw the signs on the track down there where the blood was, where Mr. Moore was

supposed to have been killed. It was probably two hours after the accident when I first went down there. I saw a soft place in the pathway over which the brakemen run, it was three feet wide, probably, and four or five feet long, and it was along the side-track, it was just East of the West house track switch. It was a hole filled in with cinders or soft substance and hadn't been packed down. * * * * * What first attracted my attention to this soft place was that I stepped in it myself, and that called my attention to it."—Tr. p. 51.

To the same effect is the testimony of Irvin Smith, Transcript page 52-53.

ON PROXIMATE CAUSE

In the application for certiorari, and in the brief on hearing, the petitioner states, in substance, that we have presented a case wherein the head-brakeman was seen running along the ground by the side of the train, and in the same direction with it, and making two or more efforts as though he intended to get on, at which time he passed out of sight of the witness who saw him; and that there was a low place in the ground along the route traveled by the deceased; and that the print of a left shoe was seen and the body of the deceased was found about ten feet West of the shoe print. It is, therefore, thought not inappropriate for us to make some further statements from the Record, bearing on the cause of the deceased's death.

C. E. Mayhon, for the petitioner, testified:

"When I first saw Mr. Moore, he was running along by the side of the train and he just reached up like he was going to catch on, but he didn't raise himself off the ground, the best I could see he didn't catch it. When I saw him first make the motion as though he was getting on the train, it looked like it was something like about three car lengths behind the engine. After that he ran on West, the same way the train was going. When I first saw him make that motion with his hands, I was right West of the East end of the switch there, just West of the crossing. After making this first motion while he was running along by the side of the train about the third car, he continued to run along with the train. The train was outrunning him. Then I seen him make another attempt, that is, *reach like he was going to catch again. That was the same kind of reaching as before, but I never did see him raise himself off the ground. He made the same kind of motion toward the car as before.* Then he was out of my sight. He was running the last time I saw him and went out of my sight. * * * * I know approximately where the place is my son pointed out to me where he saw a footprint in a soft place, I know about where it is. I know where Mr. Moore was killed, I went there after he was killed. I saw the place where he was killed under the train and know where that place is. Where my son said this hole was, the last time I seen Mr. Moore, he was East of this hole, but he was killed West of where this

hole was. I suppose he passed over that place after he went out of my sight and before he was killed, he was West of this hole when he was killed, and he was East of it when I saw him go out of my sight. Oh, it must have been something like 50 or 60 feet, in my best judgment, from the place he went out of my sight to the place he was killed. It must have been something like 8 or 10 feet, possibly 12, not so very far, from the place he was killed back to the place where this footprint was."—Tr. pp. 46-47.

Leonard Mayhon, a witness for respondent, went down to the place where Mr. Moore was killed, and he testified:

"I saw the signs on the track down there where the blood was, where Mr. Moore was supposed to have been killed. It was probably two hours after the accident when I first went down there. I saw a soft place in the pathway over which the brakemen run, it was three feet wide probably and four or five feet long, and it was along the siding track, it was just East of the West house track switch, it was a hole filled in with cinders or soft substance and hadn't been packed down. I saw a footprint in that hole, it was pointed West, it was the left foot. I saw a footprint of the left foot going West. What first attracted my attention to this soft place was that I stepped in it myself and that called my attention to it. There was just one footprint. The footprint that I saw in there was deeper than the footprint that I made, it looked

as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest. That hole or soft place was six or eight feet, maybe ten feet, East of the place where Mr. Moore was killed. I know Mr. Saulsbury, and when he was there recently, I took him down there to this place to show him where I saw this footprint, but it was hard then and had packed down, and you couldn't tell."—Tr. p. 51.

Irvin Smith testified:

"I went down to the place where this accident happened with Leonard Mayhon, and I saw the blood signs where Mr. Moore was killed on the passing track. There was a soft place probably eight or ten feet before where he was killed,—eight or ten feet East of where he was killed. My attention was first called to that place when Leonard stepped one foot in it and called my attention to it. After Leonard called my attention to it, I saw one noticeable footprint in the hole. The footprint was going West. I stepped in this soft place myself. Compared to the footprint that I made and the one Leonard made, the footprint in there was a heavier one. It was a man's footprint. The front part was the deepest. It was the left foot."—Tr. p. 53.

R. O. Robinson testified for the petitioner:

"I am a photographer. About the 19th day of February, 1927, I was called on by the representatives of the Railway Company to take some photographs at Tolar.

Mr. Miller here is the gentleman that carried me out. He is the Claim Agent for the Railway Company and lives at Clovis. I didn't know Mr. Moore. I am not sure how many photographs I took, it was either three or four, I think. These are the pictures I took (Exhibits A, B and C) and turned over to the Railway Company. They correctly represent the situation there. I had pointed to me the place that the blood is still showing where Mr. Moore was killed. I also saw a hole or depression in the pathway there, used by brakemen, close to that place. I had that pointed out to me by the agent, Mr. Traylor. It wasn't exactly a hole, it was just a little bit lower place than the surrounding ground, not very much lower, but a little lower. It was possibly some six or eight feet long, I judge. I might not be correct but something near that and possibly three feet wide. It was just a little bit lower than the other ground surrounding it, the same color and everything, but just a little bit lower and softer than the surrounding ground. I stepped in it to see how much it would give. As to whether or not it did give sufficiently to cause a man to lose his balance who was running, I will say that, in my opinion, it might cause a man to stumble who was running and it might not, depending upon circumstances, in my opinion, whether a man knew it was there or didn't know it was there or was looking where he was stepping. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment. That hole was right in the pathway.

> There was a pathway there, it was well beaten. It was the same color, but you could tell it was worn out. That pathway was close to the track."—Tr. pp. 53-54.

Max B. Miller, for the petitioner, testified that he was in the engineering department of petitioner and that he had occasion to go to Tolar, and make some measurements on the day after the deceased was killed, the measurements to be made in connection with the death of the deceased, and we quote further as follows:

> "I was there the day after the accident, the 16th day of February. I was there for the purpose of ascertaining all of the conditions that existed there. * * * * * The agent down there at that time was Mr. Traylor. I met him when I was down there. He told me he saw the accident. He is here."—Tr. pp. 71-72.

In connection with the testimony of the witness Robinson to the effect that the eye witness Traylor, who was the company's agent, pointed out to him the hole or soft place, we submit, to be considered by the Court, the memo made by the witness Robinson on the pictures which were taken for petitioner, and introduced in evidence by petitioner, the memo on the pictures (Exhibits B and C) showing that Agent Traylor, the eye witness, was showing the different scenes and directing the places to be photographed, said photographs having been taken to throw light on the happening

of the death of the deceased and on the surrounding grounds.

ARGUMENT

The petitioner presents three specifications of error. In the first, an attack is made on the sufficiency of the evidence to sustain the jury finding of negligence.

The second and third specifications claim that the verdict and judgment are based wholly upon speculation, conjecture and possibility.

While the first specification seems to have been abandoned by petitioner, in that the same is not urged in its brief, we have included in our statement evidence bearing upon the first specification, and, will undertake some argument under it. Also, following the course pursued in our statement, we will discuss at short length the suggestions made in petitioner's brief, that the deceased had no duties to accomplish in running along by the side of the train as he did.

Due, however, to the fact that petitioner has practically abandoned the first specification, and, has not made any specification on whether deceased was in discharge of his duty at the time, we will take the liberty of discussing, first, the proposition arising under petitioner's second and third specifications—that is, on whether the negligence of the petitioner was the proximate cause of his death.

PROXIMATE CAUSE

We have no quarrel with any of the cases cited and quoted from by petitioner. We do not ask for an affirmance of our case on the contention that proof of negligence alone would entitle the respondent to a recovery. The case was not tried upon any such theory. On the contrary, proof was offered to show that the negligence of petitioner was the cause of the injury. After this proof, an inquiry was submitted to the jury for a finding of whether the negligence of petitioner was a proximate cause of deceased's death. Neither do we claim that the jury should be permitted to speculate as to the cause. But we do claim that "there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." (A. T. and S. F. Ry. Co. vs. Toops, 281 U. S. 351. Quoted from by petitioner.)

The second case quoted from by petitioner is Railway Company vs Coogan, 271 U. S. 472. Mr. Justice Butler, concluding a discussion of the facts of that case, says:

> "The record leaves the matter in the realm of speculation and conjecture. That is not sufficient."

At another place in this decision, Mr. Justice Butler uses this language:

> "When circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed."

This is the view we have in presenting this case here for affirmance. Every circumstance relied upon is proved, and, in their sum, present a much stronger fact case than any of the cases which were discussed by this Court and cited in petitioner's brief. To be sure, if the facts and circumstances proved are such as to leave the matter in the realm of conjecture, the evidence would not be sufficient to support a finding or a judgment of liability.

A comparison of the facts, in the case here being presented, with the facts in the cases cited and quoted by petitioner, will, we think, disclose that our case does not class with these cases, but, on the contrary, is to be considered in line with those cases where "under all the circumstances disclosed by the evidence, it was a permissible inference by the jury" that the negligence of petitioner was the proximate cause of the death of deceased. The above quotation is from the language used by Mr. Justice Stone in New York Central Railway Company vs Marcone, 281 U. S. 345.

To use an expression used by Mr. Justice Sutherland in New York Central Railway Company vs Ambrose, 280 U. S. 486, we contend that the inference, or inferences, drawn by the jury in this case were "legitimate inferences deducible from the proved facts."

The respondent was not called on to establish the case beyond doubt, or beyond reasonable doubt, or to the exclusion of all reasonable hypotheses.

That would be the rule in a criminal case. Respondent was only under the burden to furnish reasonable evidence of negligence and of proximate cause. We might state this in the language of this Court. In Delaware Railway Company vs Koske, 279 U. S. 7, Mr. Justice Butler wrote:

> "The burden was on plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of of place where he was injured, and that in whole or in part his injuries resulted proximately therefrom."

Reasonable evidence would not leave the matter in conjecture or guess. Neither would it require such proof as would leave the matter beyond all dispute or all doubt. If respondent has made proof of facts and circumstances from which reasonable minds would infer negligence and would infer proximate cause, reasonable evidence has been produced. And we are submitting that, a study of the facts and circumstances in this case, is convincing that reasonable evidence was offered by respondent in the trial court both of petitioner's negligence and of his negligence being the proximate cause of deceased's death. The essential fact to be proved, in any case, may be proved by circumstantial, as well as by direct evidence. When circumstantial evidence is resorted to, it is not necessary that the essential fact be proved beyond any kind of doubt, or, that the fact or circumstances proved be so convincing that all other inferences are excluded. Getting this into the lan-

guage of this Court, we quote again from Mr. Justice Stone in St. Louis Railway Company vs Mills, 271 U. S. 344:

> "The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."

This statement of the law is taken from an opinion which overturned the verdict of the jury, but it nevertheless states the law. And to apply it to the case here, it would simply mean that, when the evidence or circumstances which are proved *point* to the essential fact (cause) which the jury is required to find in order to sustain the verdict, sufficient proof has been made of proximate cause.

The evidence discloses that the deceased was running along the pathway towards the hole or soft place, and was last seen within a few feet of the hole; that a footprint, a short time after the injury, was found in this hole or soft place; that the footprint so found was going in the same direction the deceased was seen to be running; that the soft place or hole was directly in the pathway of deceased; that he was bound to step in it or over it; that the footprint was a heavy print; that the toe of he footprint was deeper than the heel; that the footprint was made by a man running; that the place deceased fell under the train was about ten feet beyond the hole or soft area, just about the distance he would have fallen under the train if he had stepped in the hole and stumbled; that

a witness who stepped in the hole to see if it would give, testified:

> "If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment";

that the witness R. O. Robinson, who had been brought to the scene of the accident by the petitioner to take pictures, after having the hole or soft area pointed out to him by the railway company's agent, proved to be an eye witness, stepped in it to see how much it would give; that the witness Robinson, brought to the scene by the petitioner's claim agent, for the purpose of taking pictures, showing the different situations connected with deceased's death, was assisted in this work by the petitioner's station agent, who, as has been stated, saw the deceased when he fell and saw the entire accident; said station agent, as shown by the testimony of Mr. Robinson and as shown by the memos on pictures B and C, indicated to Mr. Robinson the different places to take pictures, describing to him what had taken place at the places photographed. The said station agent, in the discharge of his duty, was representing the petitioner, and was working for the petitioner, and, any declarations or any action of his during the time of said work would be admissible in evidence to be considered by the jury and by the Court. Not only did this station agent point out to the photographer the place where the body was and the other places to be photographed, but, at the time of this

investigation, and, at the time of this work by the agent and by the photographer, connected with the place of deceased's death, he pointed out this hole or soft place; which action and words, if any, on the part of the station agent, caused the witness Robinson, as stated above, to step in the hole to see if it would cause a man to stumble and fall.

We have found no authority on whether the action of the photographer, in stepping in the hole, and his statement that he found that it was sufficient to cause a man to fall, should be considered by the Court in sustaining this judgment. It seems that it should. However, it is knowledge gained by common experience and by common observation that a man running, with his mind bent on other affairs, would be caused to stumble and probably fall by stepping into a hole, a soft place or depression. We know, by common experience and by common observation, that such a step would more likely cause a running man to stumble and fall than a man walking. From our own knowledge, we naturally reach the conclusion that a man running at the heighth of his speed, along a hard pathway, unmindful of any soft place or depression in his path, is quickly and easily thrown off balance, by striking an unexpected object and by stepping in a soft place or depression unexpectedly. But, certainly, without any doubt, the action of the company's employe, who was an eye witness to the accident, in connection with pointing out the other material places, in pointing out

the hole or soft place, is entitled to consideration at the hands of the jury and the Court.

The evidence shows that there was a hole in the pathway and that the deceased was running in the pathway towards the hole and was last seen within a few feet of it. In addition to the fall, however, there are circumstances to show that he stepped in the hole, and that the hole caused him to stumble and fall. The circumstances are that a footprint was found in the hole, going in the same direction that he was, and, that the footprint was a heavy footprint, and, made by a man running, and, that the toe of the footprint was deeper than the heel, further evidencing the fact that it was made by a man traveling the same way the deceased was traveling, and, at the same gait. Then, the further circumstance that this footprint that was going in the same direction the deceased was running, and was made by a footprint that was running, was a print of the left foot. On the cause of the fall, this is a very strong circumstance, when considered with all of its merits. The deceased was on the North side of the freight train and was running West (see photographs Exhibits A and B). He was, therefore, running with his left side to the freight train. To fall under the train, after stumbling in the depression or soft place, he would necessarily have had to fall to the left. We know, without proof, by our own experience and observation knowledge, that a running man will fall in the direction of the foot which stumbled, or stepped into a hole or depression. This is a law

of nature and a law of physics. The body would be thrown in the direction of the foot which, by going down, caused the body to follow it. This is strong proof that the deceased, having stepped into the soft place, fell to the left, where the train was, and that he fell under the train so near to the footprint, a distance of only about ten feet, is a further significant circumstance pointing to the essential fact—that is, that the stepping into the soft place or filled in hole was the cause of his falling under the train.

Then, too, the deceased was found about ten feet beyond the hole, about the distance he would have fallen if he had stumbled in the hole.

In the absence of any fact or any circumstance indicating that the deceased had caught hold of the train and fallen, these circumstances would certainly present a case where the jury drew a "permissible inference" from the facts.

As pointed out in the statement of the case, E. L. Traylor, the railway agent, was an eye witness to the accident. He saw the deceased pass over the hole and he saw the deceased fall. Shortly after the accident, he pointed out to the Company photographer the hole or soft area and the photographer immediately stepped in it to see how much it would give. There was no evidence as to what the agent said, but the fact that the photographer, himself, stepped in the hole for the purpose of seeing how much it would give, is offered as a very strong circumstance weighing with the finding of

the jury in this case that the deceased stepped in the hole and stumbled.

The testimony shows not only that the agent, E. L. Traylor, was an eye witness, but that he was present at the trial and was not called by petitioner as a witness.

Petitioner, in its brief, contends that it is just as probable that the deceased caught hold of the train and was thereby caused to fall, as that he was caused to fall by having stepped in the soft place. When last seen by the witness Mayhon, the deceased was within twelve or fifteen steps of the place he fell under the train. As he went out of sight of this witness, he was making no movements, indicating his intention to get on the train. If, after passing out of sight of the witness Mayhon, he had caught hold of the train, and the train had thrown him under, it would, in all probability, have carried him much beyond the twelve or fifteen steps between the place where he was last seen and the place where he fell under the train.

For the deceased to have caught hold of the train and fallen under it, would have involved an act of negligence on his part. If he had so done, he would have fallen either because the train was going too fast for him to catch it, or because he was careless in making the effort. Either would convict him of a negligent act. For him to continue to run as he was running would involve no negligence.

However, there can be no presumption of the

negligence of an employe. The contrary is true. The employe is presumed to have exercised ordinary care for his own protection. Not only is this true, but it is proper for the jury to consider this presumption of care on the part of the injured employe as a circumstance in favor of his contention. In this case, we have proof that the deceased was an exceptionally careful man and obedient to the rules. Petitioner's witness, Delaney, is shown by the record, page 59, to have testified:

> "I had known Mr. Moore something over a year and had worked with him quite a bit. He was a very careful man and very obedient to the rules. I think he was exceptionally so."

From the case cited and quoted from by petitioner, Railway Company vs Toops, 281 U. S. 351, we take this sentence:

"It is presumed that deceased proceeded with due care."

Presumption is evidence. There was evidence, then, that deceased did no negligent act as he ran along by the side of the train. It would take clear evidence to remove this presumption. (22 C. J. p. 24.) We quote as follows from the Supreme Court of Texas, in Railway Company vs Luten, 228 S. W. 159:

> "The presumption that the deceased exercised ordinary care for his own protection, and did not voluntarily place himself in a position of peril, is proper to be considered by the jury as a circumstance

> weighing in favor of the contention of the plaintiffs, and may have been so considered by the jury."

Also, from the same Court, in Hutcherson vs Amarillo Street Railway Company, 213 S. W. 931:

> "In reaching a reasonable answer to this question, it must be held in mind that the deceased is entitled to the presumption that he exercised due care for his safety, and that he did not voluntarily and negligently expose himself to danger. This presumption ,favorable to the deceased, arises, since the evidence does not account for how the injury occurred and none saw him at the time of the accident. It is an element of evidence to be considered by the jury along with the other evidence in arriving at a conclusion on the facts."

We have made these additional quotations on the value of this presumption from Corpus Juris and from the Texas Supreme Court, because the same were at hand. Like quotations could be made from perhaps all of the other Appellate Courts.

There being no evidence of negligence against the deceased, the presumption is indulged that he was in the exercise of due care. When applied to a given case, the presumption of due care means that whatever facts a party would have to prove to show due care, if the burden were on him to show it, are taken as true without any proof being offered. If the burden were placed upon respondent, in this case, to prove that deceased was in the exercise of due care, respondent would have

to prove that deceased did not take hold of the hand hold, or, attempt to get on the train, when it was running at such speed that an ordinarily prudent person would not have made the attempt. The presumption of due care, on the part of the deceased, then, means that, prima facie, he did neither of those things.

In connection with the statement, made by the Supreme Court of Texas, to the effect that it is presumed that the deceased proceeded with due care, and, that he did not voluntarily place himself in a position of peril, it is not amiss to call attention to the testimony of the eye witness, Mayhon, detailing what the deceased was doing as he ran along by the side of the train. This testimony discloses that, while the deceased was running and while he made motions toward the train, both of which indicated that he intended at some place to get on the train, he, at no time, caught hold of the train or made an actual effort to get on the same. The presumption, spoken of by the Supreme Court of Texas, would certainly warrant the inference that he had not, up to the time of passing out of sight of the eye witness, caught hold of the train, or actually attempted to get on the same, for the reason that, due to the speed of the train, such effort on his part would not have been safe. If the deceased had caught the train, he could only have been caused to fall, either because the train was going too fast for the effort, or because he was careless or negligent in making the effort. To presume that he did either would be to presume

ADDENDUM TO BRIEF FOR RESPONDENT, TO BE CONSIDERED IN CONNECTION WITH THE FIRST PARAGRAPH ON PAGE 27 OF THE BRIEF.

In connection with the consideration of the testimony that other parties walked around the scene of the accident, it can fairly be said that an inference that the footprint was made by one of these walking parties, is not as reasonable as the inference that the footprint was made by the deceased. The parties walking around were not shown to be walking in the pathway by the side of the train, and, were not shown to be walking in the direction of the footprint, and, were not shown to be running, so that the footprint made by them would meet the description of the footprint in the soft place or hole. Granting that the footprint, of the description given, could have been made by a heavy man, there is no proof that any of the men so walking were what would be known as heavy men. None of these things were proved, and, in order to make the inference that the footprint was made by someone walking around, it is plain that, in the absence of such proof, further inferences would, of necessity, have to be indulged.

On the other hand, the inference that the deceased made the footprint is made the more reasonable, not by inferences, but by the proof showing that the footprint was in the beaten path; that the deceased was traveling toward the footprint and only a few steps away when last seen; that the deceased was running when last seen and that the footprint, *from the description of it*, was made by a man running; and, that the footprint was made by a man going in the same direction

the deceased was. So we have it, that the footprint was made in the very path the deceased was traveling, by a man going at the same gait the deceased was going, and by a man going in the same direction the deceased was traveling. In this connection, we consider, also, the testimony that the hole or soft place was of such length that the deceased is bound to have stepped in it. The testimony of Leonard Mayhon is that it was four or five feet long (Record, page 52); the testimony of Irvin Smith is to the same effect (Record, page 53); the testimony of Mr. Robinson, who examined the place carefully, is that the hole was six or eight feet long (Record, page 54).

We have just stated that from the description of the footprint it must have been made by a man running. In this statement, we are passing up the statement of Leonard Mayhon, that it seemed to have been made by a man running, or, by a heavy man. We think it better to consider the description of the footprint. Leonard Mayhon said:

> "The footprint that I saw in there was deeper than the footprint that I made. * * * The *front* part of the foot was deepest."
> —Record, page 51.

Irvin Smith said:

> "Compared to the footprint that I made and the one Leonard made, the footprint in there was a heavier one. It was a man's footprint. The *front* part was the deepest."
> —Record, page 53.

Just before the quotation made from Irvin Smith, he stated that he saw one *noticeable* footprint in the hole. The fact that the boys both

stepped in to see what kind of impression their footprint would make, compared to the one they were looking at, may well be taken to mean that they were attracted by the depth and by the character of the footprint they saw in this hole. It may also well be taken to mean that, in making footprints to compare with it, they made as heavy footprints as they could. But this aside. We know from this description that this footprint was made by a running man and not simply by a heavy man. The heavy man would, of course, have made a deeper footprint than a light man. But by simply walking around, the heel of the heavy man's print would be just as deep as the toe. We know from our own knowledge, without relying on expressions of opinion by the witness, that a footprint made in a soft place, with toe so much deeper than the heel as to attract attention, is not made by a walking, but by a running man. It is a fair conclusion, therefore, that the inference that the footprint was made by the deceased is a more reasonable inference than that it was made by someone walking around the scene.

But where the proof and the circumstances show that the inference drawn by the jury is reasonable and legitimate, the Court will not set aside the jury's finding because there were facts and circumstances showing some other reasonable inference. As we understand it, where the testimony shows that anyone of several things may have brought about an injury, *without any evidence or circumstance pointing to any particular cause*, the jury will not be permitted to select one of the causes, and, thereby, cast liability against the defendant. The reason is that no cause is shown by proof of any kind, and, that no fact or circumstance points to any cause, and that, therefore,

there is no satisfactory basis for the finding made by the jury. But, where there may have been different causes, and, where the facts and circumstances point to one cause to such an extent as to make an inference in that direction legitimate, the finding of the jury, fastening liability against the defendant by reason of this particular cause, will not be set aside because, perhaps, there were some circumstances from which the inference could have been drawn in support of another cause. In other words, where the inference, drawn by the jury, has a "satisfactory foundation in testimony," the jury's verdict will be sustained, because, in such circumstances, it is for the jury to determine which inference is the more reasonable.

That the step in theory is more reasonable than falling from the train, and was the proximate cause is discussed in respondent's brief.

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Attorneys for Respondent.

that he did a negligent act, and, therefore, that he was not in the exercise of ordinary care.

The petitioner calls attention to the testimony that several parties were walking around this place between the time the deceased was killed and the time the two boys first saw the heavy running footprint in the soft place. In this connection, the description given of this footprint by the two boys should be kept in mind. It was described by each of them as being a very heavy footprint, and a footprint which, apparently, was made by a man who was running. No man is shown to have been running in this pathway at any time near this accident. If any man had been running at this place, it would have been some employe of petitioner, and it is well known that railway companies keep close track of each train that has been on a side track, and could easily find any employe who had been engaged in the discharge of duties along that pathway at a time the footprint could have been made.

It seems, in view of all these facts and circumstances, that it is not an extreme view to urge that the evidence in this case points to the essential fact of proximate cause, and that the inference drawn by the jury was a "reasonable inference" and was a "permissible inference."

That the deceased stepped in the hole can reasonably be inferred from the proved fact that he was running towards it, and that the footprint of

a running man, and, going in the same direction of deceased, was found in it.

That he fell under the train is admitted.

That the hole caused him to fall under the train is a permissible and legitimate inference from the proved facts that the hole could not be observed as he approached it, and, therefore, that the step-in was unexpected, that the filled in place was soft and gave way as he stepped in it, that he stepped in with his left foot, which, naturally, caused him to fall toward the train, that it was about ten feet from the place of the footprint to the place of the blood on the track, and from the presumption "that deceased proceeded with due care."

Having in mind that respondent is not required to produce evidence which settles a matter beyond any dispute, but, is only required to produce reasonable evidence which points to the essential fact, a consideration of all these facts and circumstances would certainly warrant a reasonable mind in concluding that the soft spot or area or hole was the cause of deceased's death.

Speaking of a reasonable mind, we are reminded that the rule is that the determination of a jury on questions of this kind is final, unless their determination is such that all reasonable men would have drawn a contrary conclusion. We are aware that this presents a question wherein the Court, rendering the last opinion, is the judge of what reasonable minds will conclude. And, too, this

must be done even sometime in the face of verdicts of juries and opinions of other courts. A consideration of the evidence in this case led the jury to find that the negligence of petitioner was the proximate cause of deceased's death, and, after careful consideration, this finding was sustained by the Supreme Court of Texas. This is not mentioned in the thought that it would bar the Supreme Court of the United States from a contrary view, should such course appear proper. It is mentioned in the belief that in the consideration of whether the jury finding is contrary to a finding that would have been made by all reasonable men, the view of the Supreme Court of Texas, in connection with the decision of the jury, will be given the consideration due.

And while on this subject, as we have been undertaking to do throughout this argument, we quote this rule in the language of this Court in Railway Company vs Ives, 144 U. S. 417:

> "When a given state of facts is such that reasonable men may fairly differ upon the question of negligence or not, the determination is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever one for the Court."

We wish here to refer to one other case cited and quoted from by petitioner in its brief—Texas and Pacific Railway Company vs Barrett, 166 U. S. 617. The quotation made by Petitioner appears

on page 28 of its brief, and is to the effect that it is not sufficient for the employe to show that the employer may have been guilty of negligence, but that "the evidence must point to the fact that he was." This is the proposition for which we are contending in this case. Having presented the fact and circumstances, as shown by the testimony quoted in our statement, and as appearing in the fact findings of the Supreme Court of Texas, it seems to plainly appear that it cannot be said that we have only shown that the negligence of the employer may have been the proximate cause, but, that the evidence so presented clearly points to the fact that it was.

A further quotation from the same by petitioner is to the effect that "where the testimony leaves the matter uncertain and shows that anyone of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for a jury to guess between the half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." We do not have such a situation in this case. Under the undisputed facts, the deceased was proceeding West with the freight train, for the sole purpose of flagging the on-coming passenger train. Under the undisputed evidence the freight train was late getting into the siding, and the passenger train was due, and it was necessary, as a precaution to save life and property, for the deceased to be as

far up the track as possible, in order that the passenger train might be flagged, to prevent a collision between the passenger train and the freight train passing on to the siding. Under the decisions of this Court, and of other Courts, so far as we know, if the deceased had undertaken to get on a train moving too fast for such effort, in this emergency, and with the purpose of flagging the train, as is agreed by all of the evidence, he would have been freed and excused for this negligent act, because he was acting in an emergency and acting to save life and property. That the deceased may have undertaken to get on the train under these circumstances is the only other thing suggested by petitioner that might have been a cause of the deceased's death. Therefore, it cannot be said that the jury was considering a case wherein several things may have been the cause, for some of which the petitioner would have been liable and for some of which the petitioner would not have been liable. If we should waive the presumption that the deceased was in the exercise of due care, and should conclude that it was just as probable that he undertook to discharge this duty by getting on the train, and was killed, we would have a situation presented wherein the injury could have happened from one of two things, either one of which would place liability against the petitioner. The concluding part of this last quotation from the Barrett case is significant. It is therein stated that the jury would not be permitted to guess between these half dozen causes and find that the negligence of the

employer was the real cause, "when there is no satisfactory foundation in the testimony for that conclusion." Under this decision such a charge could not be made and sustained against the verdict in this case, because there is a satisfactory foundation in the testimony for the conclusion reached by the jury. The rule where the plaintiff is entitled to prevail and the rule where a finding in its favor will not be sustained, is stated by Mr. Justice Butler in Northern Railway Company vs Page, 274 U. S. 65, as follows:

> "Under familiar rules, plaintiff was entitled to prevail if the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant a finding in his favor. * * * * * The verdict cannot be sustained if essential facts are left in the realm of conjecture and speculation."

Using the language of Mr. Justice Butler, we conclude this part of the discussion by saying that the essential fact is not left in the realm of conjecture, but that the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant the finding made by the jury.

NEGLIGENCE

The place where the deceased was injured and killed was a place which had been provided as a place of work. According to the testimony of Max D. Miller for the petitioner:

> "That passage way is made of crushed

rock, called screenings, that had been packed very hard."

The testimony shows it was nothing unusual for brakemen to be seen running up and down the train in the accomplishment of their work along this switch track and between the switch track and the main line track. Work was common at this place. The very kind of work the deceased was doing was common at this place, and according to the testimony and the record and that just quoted from, Mr. Miller's, the passage way between the switch track and the main line track had been prepared as a place of work for brakemen. It had been made of crushed rock, called screenings, and had been packed down very hard. According to the testimony of Leonard Mayhon, there was in the pathway a "hole or soft place filled in with cinders or soft substance and which hadn't been packed down" and which was sufficiently deep to cause a brakeman to stumble who stepped in it as he passed along the pathway, and would not be a reasonably safe place for brakemen to work. The hole had been made and had been found by someone because it had been filled in, but in remedying the condition of the hole by filling the same, the work had been improperly, unsafely and negligently done, in that it had not been packed down and made hard like the balance of the pathway and the balance of the space between the tracks. No witness discovered it by seeing it. The Mayhon boy discovered it by stepping into it. The other witnesses who testified about it discov-

ered it by having it pointed out to them. The testimony of Mr. Robinson and others was to the effect that the hole could not be detected by looking at it, because it was, in color and appearance, like the other part of the footprint and the other parts of the ground around it.

DISCHARGE OF DUTY

All of the witnesses are in agreement that a rule of the petitioner required the head brakeman (deceased) to flag the passenger train to be met at the switch when the freight train did not reach the switch in time to have five minutes as clearance. All of the witnesses are in agreement that the freight train did not get into the side track in time to clear the entry switch the required five minutes. The passenger train, as it happened, was several minutes late, but notice of this had not been received by the freight crew. All of the witnesses who testified agreed that the only way the train could be pulled into the side track, under the rules of the company, was for the head brakeman (deceased) to go up the track, either by running or by riding the train, for the purpose of being as far up as possible to flag the passenger train when it came into sight.

The matters herein covered are not mentioned in any specification of error, but are included in our brief for the reason that statements appeared in the brief for petitioner that the deceased was not in discharge of his duties at the time he was killed. We have made quotations of the evidence

to this effect under our statement, but evidence to the same effect will be found in the testimony of nearly all of the witnesses.

We, therefore, respectfully ask that the judgment of the Supreme Court of Texas be affirmed.

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APPENDIX

The opinion of the Supreme Court of Texas in the case will be found in the record beginning on page 112 and ending on page 116. On motion for rehearing the Supreme Court rendered a further opinion.

The court withdrew the last paragraph of the original opinion and substituted therefor, another paragraph.

As amended and substituted the opinion of the Supreme Court of Texas reads as follows:

> "One J. W. Moore, now deceased, was the head brakeman on a freight train of the defendant railway company, running from a point in New Mexico to another point in the same state. At a place between these two points Moore fell under one of the cars of his train and was instantly killed. Mrs. Bertha Moore, surviving wife of the deceased, qualified as administratrix of de-

ceased's estate in New Mexico, and as such administratrix, filed this suit for herself and her two minor children for damages growing out of the death of her said husband. Later Mack Saxon, plaintiff in error here, duly qualified as ancillary administrator and personal representative of the deceased's estate and intervened in the suit. Trial was had in the district court before a jury and resulted in a judgment for Saxon in his representative capacity. The railway company duly appealed to the Court of Civil Appeals for the Eighth District at El Paso, which court reversed the judgment of the district court and rendered judgment for the railway company. 21 S. W. (2d) 686. Writ of error was granted to this court on application of Saxon.

We copy the following statement from the opinion of the Court of Civil Appeals:

'Appellee Saxon alleged the death of J. W. Moore, that he was killed at Tolar, New Mexico, while in the discharge of his duties as head brakeman of appellant railway company, without fault on the part of J. W. Moore, deceased; (fol. 146) that appellant was a common carrier engaged in interstate commerce; that the deceased, Moore, received the injuries resulting in his death while in appellant's services handling interstate commerce, and that the injuries to and the death of J. W. Moore, deceased, were proximately caused by the negligence of appellant railway company and assigned several acts of negligence, among them the fast running of the freight train, and

rough handling; however, the only one submitted by the trial court to the jury being alleged, substantially, as follows: At said time at the station Tolar, J. W. Moore, the deceased, had thrown the switch, permitting the entrance of said freight train into said side or passing track, and had, with a flag in his hand, as his duty required, proceeded up the main line track for the purpose of flagging an incoming passenger train, and that as the freight train entered onto the side or passing track, and proceeded to the other end of the track, J. W. Moore, deceased, as required by his duty, crossed over to the side of the freight train for the purpose of boarding the same, and riding to the further end of the side track, in order to be in a better position to discharge the duties required of him with reference to the flagging of said passenger train; that on the side of the passing track or switch track next to the main line, is a well marked and beaten path, wherein brakemen and trainmen in discharge of like duties, traveled. That the deceased, J. W. Moore, in the discharge of his duties, was walking and running in said pathway, and while so engaged, by reason of a large hole or soft place in said pathway was caused to be thrown or fall under said train, and killed.

'The specific negligence assigned is alleged to be in causing or making a hole or depression in the said pathway and maintaining and keeping said hole and depression and soft place in said pathway; and thereby negligence in fail- (fol. 147) ing

to furnish deceased a reasonably safe place to work.

'In addition to the general denial, appellant plead, in substance, that deceased, Moore, was an experienced brakeman who knew the location of the tracks and the purpose of the train movement at the time of the accident; that he was familiar with the pathway in question, knew the speed of the passing freight train, and that if he undertook to get on the train on the passing track he did so voluntarily, and merely to serve a purpose of his own; that his duties did not require him on the train at that time, and that none of the other employees expected that he would attempt to get on the train; that his only duty was to remain on the ground and close to the switch after passenger train had passed; that if he put himself in a position of danger, he did so voluntarily. Appellant plead assumed risk and negligence on the part of the deceased under and in respect to the circumstances and facts as set up.

'The case was submitted to the jury on special issues. After the evidence was heard and before its submission appellant presented its motion for an instructed verdict, which was refused. Appellant's motion for judgment on the answers returned was likewise refused. Judgment was entered for appellee on the answers of the jury on the issues submitted.

'On the issues submitted the jury made the following findings:

'1. At the time and place alleged by

plaintiff (appellee) there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff.

'2. The deceased, J. W. Moore, was running along the track, as alleged, and while doing so and attempting to board one of the cars with which he was working he stepped on or upon such soft area or hole and was thereby caused to fall and be injured.

(fol. 148) '3. The presence of such soft area or hole was due to the negligence of the defendant.

'4. Such negligence was a proximate cause of the accident and injury to the deceased, J. W. Moore.

'5. Deceased, J. W. Moore, did not know of such soft area or hole and by the use of ordinary care incident to his employment would not have known it.

'6. The accident or injury to the deceased complained of was not due to some other risks of the employment assumed by the deceased.

'7. States the reasonable compensation appellee is entitled to recover as the damages sustained.

'On the verdict of the jury the court entered judgment for appellee and against appellant for the amount of damages found.'

From the above statement it is evident that plaintiff in error recovered in the trial court on the theory that the deceased, while

in the discharge of his duties as a brakeman, was running along by the side of the track of the railway company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed. We here call attention to the fact that this action is brought under the Federal Employers' Liability Act, and the rights and obligations of the parties depend upon such act, and the principles of the common law as applied by the courts of the United States. Under such act it is essential that the plaintiff establish negligence on the part of the railway company as the cause of the injury. *Toledo St. L. & W. R. R.* v. *Allen*, 276 U. S. 165.

We are of the opinion that the evidence quoted by the Court of Civil Appeals, and some further facts shown in the record, are sufficient in law to sustain the finding of the (fol. 149) jury as regards the cause and manner of deceased's death. *Davis, Federal Agent*, v. *Preston*, 264 S. W. 331 (Civ. App.) Ld. 16 S. W. (2d) 117 (Sup. Ct.)

As we understand the opinion of the Court of Civil Appeals, that court reverses the judgment of the district court, and renders judgment for the railway company on the theory that there is no evidence in the record sufficient in law to sustain the finding of the jury that the hole or soft place in the place of work was the direct and proximate cause of J. W. Moore's death. The evidence in the record on this question

discloses that while in the discharge of his duties, the deceased, who was an experienced brakeman, was running along the pathway beside the track on which his train was running, and toward the hole or soft place in such pathway; that when last seen he was within a few feet of such soft place or hole; that a short time after the injury a footprint was found in such hole or soft place; that such footprint was going in the same direction as the deceased; that such soft place or hole was directly in the pathway of deceased; that deceased was bound to step in or over such hole or soft place; that the above mentioned footprint was a heavy one, and made by a man running; that the place where deceased fell under the train was about ten feet beyond the hole or soft place, and just about the distance deceased would have fallen if he had stepped in such hole or soft place and stumbled; and that such hole or soft place was the only thing shown which could probably have caused deceased to fall. In this connection we call attention to the fact that one of the witnesses who examined the hole or soft place and himself stepped into it, testified:

'If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment.'

There is a warrant in the evidence for the inference that the deceased intended to get on the train, but we are unable to find any evidence in the record, and none has been pointed out to us, showing that he ac-

tually made the attempt; that is, that he actually caught hold of the train. On the other hand, there is circumstantial evidence to, in law, support a fact finding that he was caused to stumble and fall under the train, by stepping into the hole or soft place in the pathway along the side of the track and in which pathway he was running. This issue was fairly presented to the jury and (fol. 158) found as above stated. Nor can it be said that the inference of taking hold of, and falling from the train, was equally as warranted as the finding made by the jury. The evidence places the deceased, when last seen, in the pathway *running* toward the soft place, where the footprint was found, and within a few feet of same. It would be a more reasonable inference that the deceased continued in what he was actually doing for the few additional feet necessary to travel, than that he changed his course and took hold of and was thrown from the moving train. Moreover, 'it is presumed that deceased proceeded with due care,' (*A. T. & S. F. Railway Co.* v. *Toops*, 281 U. S. 351), and that he 'did not voluntarily place himself in a position of peril,' (*Railway Company* v. *Luten*, 228 S. W. 159, Supreme Court of Texas), which presumption 'is properly to be considered by the jury as a circumstance weighing in favor of the contention of the plaintiffs, and may have been so considered by the jury' (same case last cited)."